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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 178

HARRY I. SCHWIMMER,
Petitioner,

v.

UNITED STATES OF AMERICA, WYLLYS NEWCOMB,
HARRY RICHARDS and OMAR SCHNATMEIER.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause on April 23, 1956.

OPINION BELOW.

The Opinion of the Court of Appeals has not yet been reported, and is printed in the Appendix, infra, pp. 9-12.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 23, 1956. A petition for rehearing was filed by petitioner on May 11, 1956, and said petition was denied on May 21, 1956. An order staying the Court of Appeals' mandate was entered on June 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254 (1).

QUESTION PRESENTED.

1. Whether one, whose personal records are seized by Grand Jury subpoena from a third person with whom they had been stored, and who had not seen or had any real knowledge of the contents of said records for a long period of time, and who files a motion attacking said subpoena without specifically setting out the Fifth Amendment, and is later informed by Government counsel that he is the subject of the Grand Jury investigation, is precluded from asserting the privilege against self-incrimination as to said records in a suit thereafter filed seeking to enjoin the use of said records in the Grand Jury proceeding.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT.

(This cause relates generally to the same subject matter which is pending before this Court on Petition for Certiorari in the case of Harry I. Schwimmer, Petitioner, v. United States of America, which petition is being filed simultaneously herewith.)

On November 30, 1955, petitioner filed in the United States District Court for the Eastern District of Missouri a Complaint (R. 1), wherein the following allegations, insofar as they are material to this petition, were made: Petitioner is an attorney at law. For some time prior to October 21, 1955, his personal records and legal files which he had amassed during his practice of law were stored by him with the Dean Rubber Manufacturing Company in Kansas City, Missouri. A United States Grand Jury in St. Louis subpoenaed petitioner's records which were in the possession of the Dean Rubber Manufacturing Company, and all of his records which were held by the Dean Company were produced by a representative of that company before the Grand Jury (R. 2). Before the records were examined petitioner filed in the District Court motions to quash said subpoenae duces tecum on the grounds inter alia that they violated the attorney-client privilege that they were broad

and unreasonable, and that they constituted an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States. These motions were on October 31, 1955, overruled by the District Court (R. 2).

It was also alleged in said Complaint filed in the District Court that petitioner had reason to believe that his own conduct was then the subject of an inquiry before the said Grand Jury in St. Louis (R. 4), that Government counsel at the hearing on the aforementioned motions to quash had expressly told the Court that petitioner's conduct was under investigation by the Grand Jury; that to the best of his knowledge his books, records and legal files were then in the possession of some agent of the United States, and that the defendants in said cause, being the United States Attorney for the Eastern District of Missouri, the United States Marshal and the Special Assistant to the Attorney General handling the Grand Jury inquiry, intended to examine and use said petitioner's property in the investigation before the Grand Jury. Petitioner claimed that the examination and use of his books and records would constitute an unreasonable search and seizure of his property in violation of the Fourth Amendment to the Constitution of the United States and would require the petitioner to furnish evidence against himself in a criminal proceeding such as to constitute an unlawful and unwarranted seizure in violation of the Fourth and Fifth Amendments to the Constitution of the United States (R. 5-6). Said Complaint therefore prayed that an injunction be issued restraining the use of or examination of said books and records in the said Grand Jury investigation and ordering the return of said property (R. 6).

The defendants filed a motion to dismiss said Complaint on the ground that it failed to state a cause of action (R. 9), and said motion was sustained by the Court (R. 10).

On appeal of said order to the United States Court of Appeals for the Eighth Circuit, the judgment of the District Court was affirmed (see Court's Opinion, Appendix, p. 13), the Court holding inter alia that petitioner's claim of a violation of his privilege against self-incrimination could not be considered since that claim came too late and was waived since it was not expressly asserted in petitioner's original motions to quash the subpoenae duces tecum.

REASONS FOR GRANTING THE WRIT.

1. This cause involved the all-important question of whether petitioner's own books and records could properly be used against him during the course of an investigation by a Grand Jury which was then conducting an inquiry into the petitioner's own conduct and activities. There is no question but that the Complaint filed below was a proper proceeding for the purpose of seeking to enjoin the use of improperly seized evidence in a Grand Jury inquiry. This Court, in **Perlman v. United States**, 247 U. S. 7, reviewed on its merits a case in which a Complaint had been brought seeking to enjoin a United States Attorney from taking into his possession certain documentary evidence and using said evidence during the course of a Grand Jury investigation.

The Court of Appeals, however, in its Opinion affirming the dismissal of the Complaint by the District Court, held that petitioner was precluded from asserting his claim of privilege against self-incrimination through the use of his private books and papers, for the reason that he had earlier filed motions to quash the subpoenae duces tecum which had been issued for the compulsory production of these documents and had failed specifically to assert the privilege against self-incrimination therein. The allegations of petitioner's Complaint filed in the District Court and indeed the admissions of Government counsel in his argu-

ment opposing petitioner's earlier motions to quash in the District Court (R. 20 of companion case, Harry I. Schwimmer, Petitioner, v. United States of America) clearly indicate that at the time of the filing of the Complaint in the District Court an investigation was then being conducted by the Grand Jury into petitioner's own conduct, and that petitioner was himself the subject of inquiry by the Grand Jury. Under these circumstances it would appear that petitioner had a clear and substantial right to be protected with regard to his claim against self-incrimination. There was no question but that the papers involved were his own private and personal records. It is axiomatic that the constitutional guaranty forbidding the compulsory testimony of an accused applies equally to the compulsory production of his private books and papers. **Boyd v. United States**, 116 U. S. 616; **Wilson v. United States**, 221 U. S. 361; **United States v. White**, 322 U. S. 694.

In this respect it is urged that the decision of the Court of Appeals precluding consideration of the incrimination issue is contrary to the case of **Emspak v. United States**, 349 U. S. 190, wherein it was held that the waiver must be clear and unequivocal, and that every reasonable presumption must be considered against the waiver of a fundamental constitutional right. See also **Smith v. United States**, 337 U. S. 137, 150. The allegations of the Complaint filed in the District Court indicate that petitioner's records and files were not seized from his person or from his immediate possession, but rather from a third party with whom he had stored them some long time prior thereto, that said files and records were delivered by said third party to the Government counsel or to the United States Marshal (R. 2-6), and that at the time the instant Complaint was filed petitioner did not have access to the records and had not seen them for some long period of time. Indeed under the order of the District Court in the companion case, petitioner was given no right to review

the records or to examine them even after the District Court's Representative delivered certain of those records directly to the Grand Jury (see Court's Opinion in companion case, page 16) Under these circumstances the alleged failure of petitioner specifically to set out in his earlier motions to quash the subpoenae that the use of his records would furnish evidence against him in a criminal proceeding ought not be considered a waiver of his right through the Complaint filed in the District Court to raise the self-incrimination question. (It should be remembered also that in his motions to quash the subpoenae petitioner did set out that the compulsory production of his books and records would constitute an unreasonable search and seizure under the Fourth Amendment to the United States Constitution, which Amendment has been held to prohibit the compulsory production of one's private papers for the purpose of establishing a criminal charge against him. **Boyd v. United States**, supra.) Furthermore, not until after petitioner's motions were filed did Government counsel specifically inform petitioner that he was himself under investigation.

Thus at the time of the original motions to quash the subpoenae petitioner did not have his legal files and records before him and had not indeed seen them for a long period of time. Therefore, he could not intelligently and knowingly have waived any constitutional privilege relative to self-incrimination since he had no real knowledge of their contents. In this respect the Court of Appeals' decision is further in conflict with the cases of **McKinney v. United States**, D. C. Cir., 208 F. (2d) 844, and **Waters v. Central Trust Co.**, 2 Cir., 126 F. 469, to the effect that such a waiver of a constitutional privilege cannot lightly be inferred and can be found only if there is an **intentional** abandonment or relinquishment of a **known** right. This question of whether one can intentionally waive the privilege against self-incrimination

when he does not at the time have any real knowledge of the contents of the records involved is one of extreme importance, and the Court of Appeals' narrow and limiting interpretation of the contitutional guaranty should therefore be reviewed by this Court.

CONCLUSION.

For these reasons, it is therefore respectfully submitted that this Petition for a Writ of Certiorari should be granted.

HARVEY B. COX,
MORRIS A. SHENKER,
BERNARD J. MELLMAN,
Counsel for Petitioner.

OPINION OF COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,494.

Harry I. Schwimmer,
Appellant,
vs.
United States of America, Wyllys Newcomb, Harry Richards, and Omar Schnatmeier,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[April 23, 1956.]

Harry I. Schwimmer, pro se (Harvey B. Cox, Morris A. Shenker and Bernard J. Mellman were on the brief), for Appellant.

St. John Barrett, Special Attorney, U. S. Department of Justice (Harry Richards, United States Attorney, Murry L. Randall, Assistant United States Attorney, and Albert M. Christopher, Attorney, Department of Justice, with him on the brief), for Appellees.

Before Gardner, Chief Judge, Johnsen and Vogel, Circuit Judges.

Johnsen, Circuit Judge.

This is a companion case to No. 15,460, Schwimmer v. United States, decided concurrently herewith. In that case

we reversed the trial court's denial of a motion to quash one subpoena duces tecum issued in a grand jury investigation, and affirmed, with modification, the denial made as to another.

Thirty days after the trial court's ruling on the motions to quash, and fifteen days after our action upon the application made for a stay of the trial court's order pending appeal, Schwimmer instituted this suit in injunction, to prevent any of the files and papers required to be produced under the two subpoenas from being turned over to the grand jury. He further sought to prevent some other files and papers, belonging to a third party and produced by the latter for use by the grand jury, from being so turned over.

The injunction was sought against the attorneys for the Government handling the grand jury investigation and against the United States Marshal.

The trial court sustained a motion to dismiss the suit, and Schwimmer has appealed.

Our decision in the companion case has determined the questions involved as to Schwimmer's own files and papers, except that he has attempted in this suit to claim additionally that the production required by the subpoenas would violate his privilege against self-incrimination under the Fifth Amendment. That claim, if it had any basis and he was not intending to waive it, ought, we think, to have been asserted by him in his motions to quash the subpoenas, when he consideredly chose to make that form of attack his basis for obtaining judicial intervention and determination of his rights to have the files and papers kept from coming into the grand jury's possession. Schwimmer was an attorney and so manifestly did not lack knowledge of what his rights were or how they could be vindicated. Without any attempted explanation in his complaint of

hy the claim of self-incrimination was not asserted in his notions to quash, it would appear that he was engaging in series of ballistic steps, to halt, for as long a time as possible, the turning over to the grand jury of any part of his les and papers. The court was not required to allow itself r the grand jury to be thus toyed with in the conducting f an investigation. (What we have said is, however, without any implication on the question of self-incrimination n relation to any trial proceedings under the indictment vhich has now been returned against Schwimmer.)

But apart from what has been said above, there is another reason why the court's dismissal of the injunction suit must be affirmed. At the time the request came before the court, there was no basis for it to issue an injunction, to prevent the grand jury from getting possession of such part of Schwimmer's files and papers as it was open to the Master to turn over to it, since this had already occurred. Whether the fact was then known to Schwimmer or not, the grand jury had on the previous day returned an indictment against him, and thus an injunction to prevent delivery and use of the files and papers could not have been to any avail.[1]

As to the files and papers of the third party which Schwimmer similarly sought to have kept from the grand jury, the situation is the same. This leaves whatever attorney-client privilege there may have existed in Schwimmer's favor as to these files and papers (Schwimmer claimed that the third party was a lawyer and that he was the third party's client) a matter for assertion by him in relation to any attempted use of such files and papers on a trial under the returned indictment. It may be added that Schwimmer's further claim that any use of such third

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[1] We need not here consider to what extent, if any, injunction is available to prevent a grand jury's consideration of subpoenaed documents.

party's papers would involve also a violation of the Fifth Amendment against him is untenable, because admittedly he had neither ownership nor possession of the papers, and their production thus could hardly involve any incrimination of himself at his own hands. A client's right of privilege as to files and papers which are the property and in the possession of his attorney is independent of his rights under the Fifth Amendment. It rests on its own policy of sanctity as to confidences, regardless of whether any disclosure would or would not be capable of legal effect against him. Breach of the privilege by an attorney through disclosure, or by a court in erroneously failing to vindicate it, is therefore not as such a violation of the Fifth Amendment, in its guaranty against self-incrimination.

Affirmed.

A true copy.

Attest:

E. E. Koch,
Clerk, U. S. Court of Appeals, Eighth Circuit.

(Seal)

(Judgment.)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15494.

September Term, 1955.

Monday, April 23, 1956.

Harry I. Schwimmer,
Appellant,

vs.

United States of America, Wyllys Newcomb, Harry Richards and Omar Schnatmeier.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by appellants pro se and by counsel for appellee.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

April 23, 1956.